

MF 06-2

Tax Type: Motor Fuel Use Tax

Issue: Dyed-Undyed Diesel Fuel (Off Road Usage)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket # 00-ST-0000
v.)	Acct. # DP-00000, 000
)	NTL # 00-00000000
ABC ASPHALT CO., INC.)	NTL # 00-00000000
and ABC MATERIAL CO.)	NTL # 00-00000000
Taxpayers)	

RECOMMENDATION FOR DISPOSITION

Appearances: John Robinson, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; *John Doe, pro se*, for ABC Asphalt Co., Inc. and ABC Material Co.

Synopsis:

The Department of Revenue (“Department”) issued two Notices of Penalty for Dyed Diesel Fuel Violation (“Notices”) to ABC Asphalt Co., Inc. (“taxpayer”). Each Notice alleged that the taxpayer operated a licensed motor vehicle that had dyed diesel fuel in its tank. The Department also issued a Notice of Penalty for Dyed Diesel Fuel Violation to ABC Materials Co. (“taxpayer”) that alleged this taxpayer failed to display the required notice, “Dyed Diesel Fuel, Non-taxable Use Only” on its storage tank or facility. The taxpayers are sister companies with the same ownership. The taxpayers

timely protested the Notices, and an evidentiary hearing was held. During the hearing, the taxpayers argued that the fuel was not knowingly put in the fuel tanks and the notice was inadvertently omitted from the storage tank. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On May 6, 2004, a Special Agent of the Department inspected the fuel in the tanks of several trucks owned by the taxpayer and found dyed diesel fuel in the tanks of two of them, license numbers 0000000 and 00000. (Dept. Ex. #1; Tr. p. 8)

2. On May 28, 2004 the Department issued two Notices of Penalty for operating a licensed motor vehicle with dyed diesel fuel in its tank on May 6, 2004. The first Notice showed a penalty due of \$2,500, and the second Notice showed a penalty due of \$5,000 because it was “a second or subsequent occurrence.” The Notices were admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1)

3. The taxpayer purchased the truck with license number 0000000 on September 23, 2003 from an out-of-state company. At the time of the purchase, the odometer reading was 180,922. According to mileage records that are filed with the State every six months, on December 31, 2003 the odometer reading was 181,241 and on June 30, 2004 it was 181,339. During the nine months between the time of purchase and June 30, 2004, the taxpayer put 417 miles on the truck. (Taxpayer’s Ex. #1, 2; Tr. p. 7)

4. On June 30, 2004, the truck with license number 00000 had an odometer reading of 148,986. On July 1, 1995, the odometer reading was 146,432. During this nine year time period, the taxpayer put 2,554 miles on the truck. (Taxpayer Ex. #1)

5. At the time of the inspection, the concentration level of the dyed fuel in the tank of the truck with license number 00000000 was 1.7 parts per million (PPM). For the other truck, it was 1.2 PPM. For a full tank of dyed diesel fuel, it would be approximately 12.5 PPM. The trucks had approximately 14% and 10% of dyed fuel in their tanks respectively. (Dept. Ex. #1; Tr. pp. 17-18)

6. On May 6, 2004, the taxpayer failed to display the notice “Dyed Diesel Fuel, Non-taxable Use Only” on its container, storage tank, or facility that is used to store or distribute dyed diesel fuel. (Dept. Ex. #1)

7. On May 28, 2004 the Department issued a Notice of Penalty to the taxpayer showing a penalty due of \$500 for the failure to display the required notice on its container, storage tank, or facility on May 6, 2004. The Notice was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1).

CONCLUSIONS OF LAW:

Paragraph 15 of section 15 of the Motor Fuel Tax Act (“Act”) (35 ILCS 505/1 *et seq.*), provides in part as follows:

If a motor vehicle required to be registered for highway purposes is found to have dyed diesel fuel within the ordinary fuel tanks attached to the motor vehicle * * *, the operator shall pay the following penalty:

First occurrence.....	\$2,500
Second and each occurrence thereafter.....	\$5,000

(35 ILCS 505/15). Section 4f of the Act provides as follows:

A legible and conspicuous notice stating “Dyed Diesel Fuel, Non-taxable Use Only, Penalty for Taxable Use” must appear on all containers, storage tanks, or facilities used to store or distribute dyed diesel fuel.

(35 ILCS 505/4f). Subsection 14 of Section 15 of the Act provides as follows:

Any person who owns, operates, or controls any container, storage tank, or facility used to store or distribute dyed diesel fuel without the notice required by Section 4f shall pay the following penalty:

First occurrence.....\$ 500
Second and each occurrence thereafter.....\$1,000

(35 ILCS 505/15). The taxpayer contends that the penalties that were imposed in this case should be waived. With respect to the trucks, the taxpayer first argues that the truck with license number 0000000 was purchased from an out-of-state company approximately 7 months prior to the date that the truck was inspected. The truck is a 1978 truck, and the taxpayer did not check the fuel in the tank to determine whether it had dyed diesel fuel in it at the time of purchase. The taxpayer maintains that it only put 353 miles on that truck from the time it was purchased until the time of the inspection, and the taxpayer had not fueled the truck since it was purchased. The taxpayer believes that the dyed fuel was in the tank when it purchased the truck.

With respect to the second truck, the taxpayer claims that several years earlier, the truck was used at its asphalt plant where it was being used for off-road purposes. In that instance, it was appropriate to put dyed diesel fuel in the tank. This truck was operated a total of 2,554 miles during a nine-year period, and the taxpayer contends that there was simply residue from the dyed fuel that was put in the tank for off-road purposes. The Department's inspector tested approximately 12 trucks on the day in question, and none of the other trucks had dyed fuel in their tanks. During cross-examination, the Department's inspector testified that in order to flush out the dye in the tanks, the taxpayer would have to run approximately six tanks full of fuel through each truck to eliminate it. (Tr. p. 19) The taxpayer also contends that the inspection of both of the trucks should be considered one occurrence.

With respect to the notice that should have been on the storage tank, the taxpayer claims that it had recently replaced an old tank and one of its supervisors had the proper notice for the new tank in a desk drawer. As soon as the agent notified him that the notice was not on the tank, the taxpayer claims that he immediately placed the notice on the tank. The inspector testified that if someone tells him that they have a notice readily available, he generally does not write up a violation.

Section 21 of the Act incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department's determination of the amount owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount due. 35 ILCS 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2nd Dist. 1978).

In this case, the Department's *prima facie* case was established when the Department's certified copies of the Notices were admitted into evidence. Once the Notices were admitted into evidence, the Department's position is legally presumed to be correct. In response, the taxpayer did not present evidence showing that it did not have dyed diesel fuel in its tanks or that it displayed the proper notice on its storage facility for dyed diesel fuel.

The facts in this case may be very unfortunate, especially if the only method for flushing dyed fuel out of the tanks is to run six full tanks of fuel through each truck to

eliminate it. However, the statute does not have a provision for abating the penalties for reasonable cause. The statute simply imposes the penalties if dyed fuel is found in the tanks and if the proper notice is not on the storage tank. Also, the Department's regulations indicate that a separate occurrence took place for each truck that had dyed fuel in its tank. See 86 Ill. Admin. Code §500.298.

Recommendation:

For the foregoing reasons, it is recommended that the penalties be upheld.

Linda Olivero
Administrative Law Judge

Enter: October 18, 2005